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CONRAIL



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247077

April 13, 1999

Ann Coyle, Esquire
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

VIA TELECOPIER

Re: Access to Conrail Property, Tilton, IL

Dear Ms. Coyle:

This is a follow-up to my letter dated April 9, 1999, and our subsequent telephone conversations. Please discard the earlier version of this letter, which contains several typographical errors.

In other instances in which EPA, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") § 104(e), 42 U.S.C. § 9604(e), has gained entry to Conrail property adjacent to an active rail line, EPA has provided a scope of work or other documentation that describes in detail the work to be done on Conrail property. The documentation has included a plan that shows the exact locations where sampling will be taken.

In addition, the EPA has agreed as follows:

1. EPA will consult with Conrail's Area Engineer. If conditions warrant at any time, Conrail will provide engineering inspection, facility location and identification and/or flag service. EPA will pay to Conrail the reasonable costs and expenses thereof. If it is necessary to perform track or facility alterations to enable EPA to perform its work, EPA understands that Conrail will perform the alteration work and EPA will reimburse Conrail for the reasonable costs of that work.

Generally, Conrail requires notice to the Area Engineer at least ten days before work is to begin and consultation and the Area Engineer's approval before the work starts.

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2. Upon completion of the work, Conrail's property shall be left in a condition satisfactory to the Area Engineer. This includes the restoration of any fences removed. If any tracks or facilities are altered by EPA during the course of time EPA entered Conrail property, EPA agrees to allow Conrail to repair or maintain the tracks or facilities and EPA shall reimburse Conrail for the reasonable expenses of the repair or maintenance.

3. EPA shall furnish to Conrail the result of all tests conducted by EPA upon samples taken from Conrail's property, including any and all reports and analyses obtained or compiled by EPA or its agents.

4. EPA's contractors shall provide applicable and appropriate insurance and shall maintain the insurance throughout the term of the Access Agreement, unless Conrail expressly waives any specific requirement in writing. EPA or its contractors shall provide Conrail with copies of the insurance policies and the original Railroad Protective Liability insurance prior to commencing work. The insurance will be endorsed to provide that the insurance company shall give prior written notice to Consolidated Rail Corporation, Manager-Insurance, 2001 Market Street, 6A, P.O. Box 41406, Philadelphia, PA 19101-1406 (fax (215-209-5377) if the policies are terminated or changed in a material way.

Conrail considers applicable and appropriate insurance to be:

a. Workers' Compensation insurance in Statutory Amounts. Employers' Liability and Occupational Disease Insurance with limits of \$1,000,000 each accident, \$1,000,000 policy limit and \$1,000,000 each employee. Such policy shall include a waiver of subrogation in favor of Conrail.

b. Automobile Liability insurance with a limit of not less than \$5,000,000 combined single limit for bodily injury and/or property damage per occurrence. Conrail must be named as an additional insured under this insurance.

c. General Liability insurance, including contractual liability insurance, with a limit of not less than \$5,000,000 combined single limit for bodily injury and/or property damage, for damages arising out of bodily injuries to or death of all persons in any one occurrence and for damage to or destruction of property, including the loss of use thereof, in any one occurrence. Conrail must be named as an additional insured under this insurance.

d. With respect to the operations performed by EPA's contractors or any of their subcontractors, Railroad Protective Liability Insurance (ISO-RIMA Form) in the name of Consolidated Rail Corporation, with a limit of not less than \$2,000,000 per occurrence, combined single limit, for bodily injury and/or property damage, for damages arising out of

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bodily injuries to or death of all persons and for damage to or destruction of property, including the loss of use thereof. Such insurance shall also contain an aggregate of not less than \$6,000,000 for damages arising out of more than one occurrence. Conrail shall be the "Named Insured" on this policy.

Alternatively, EPA or its contractors may pay \$250.00 to Conrail for Railroad Protective Liability Insurance coverage. If the contractors select this option, the Railroad Protective Liability Insurance will provide insurance coverage exclusively for Conrail's legal liability for acts or omissions of EPA, its contractors and/or subcontractors in connection with work on Conrail's property. If the \$250 is not paid to Conrail, evidence of Railroad Protective Liability insurance must be provided.

e. Professional Liability insurance with limits of not less than \$5,000,000 per occurrence/\$5,000,000 aggregate covering bodily injury, property damage and cleanup expenses resulting from pollution conditions arising out of an act, error or omission in the rendering or failure to render professional services in connection with the work on Conrail's property.

Also, General Contractor's Pollution Liability coverage, with limits of not less than \$5,000,000 per occurrence/\$5,000,000 aggregate covering bodily injury, property damage and cleanup expenses resulting from pollution conditions, also providing coverage for contractor's liability for subcontracted activities, such as lead paint removal and asbestos abatement. Conrail must be named as an additional insured under the Professional Liability insurance and General Contractor's pollution liability insurance.

The provision of detailed information is a reasonable action that ensures Conrail knows the work to be done on its property so that it can understand the risks to the property, personnel of Conrail, EPA and EPA's contractors, and the general public. Consultation with the Area Engineer, and his approval before work begins, are reasonable actions that serve to minimize the risks.

Restoration of the property is reasonable and ensures that the property is left in a safe condition. Provision of test results also is a reasonable measure that allows Conrail to obtain information about the environmental conditions on its property.

The requirements concerning insurance are reasonable and in light of the purposes of the insurance are in the EPA's interest. To the extent that waivers of subrogation in Conrail's favor and the naming of Conrail as an additional insured are needed, it is a simple task to obtain them and should cost EPA's contractor no additional insurance premiums. Standard policies for the types of insurance involved allow for waivers and naming of additional insureds without cost to the insured. Therefore, it is a simple administrative matter for a

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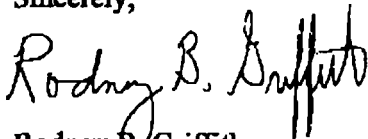
contractor to request the waivers and naming of Conrail as an additional insured and to obtain copies of the insurance policies and appropriate certificates of insurance.

The purpose of the contractor's insurance is to provide funding for an unexpected loss that creates a risk of insolvency, which could result in its inability to complete performance of its contract with EPA. The waivers and naming of Conrail as an additional insured increase the likelihood that in the event of a loss and claim by Conrail the claim will be covered by insurance. Conversely, the waivers and naming of Conrail as an additional insured decrease the risk of the contractor's insolvency and inability to fulfill its contract with the EPA.

The requirement of Railroad Protective Liability Insurance is reasonable. Furthermore, it is in the interest of the EPA and its contractor that the contractor obtain Railroad Protective Liability Insurance because EPA expects the contractor to perform work within fifty feet of a railroad track. Standard casualty insurance policies contain an exemption for any accident within fifty feet of a railroad track. Therefore, if there were an occurrence while the contractor was working within fifty feet of a Conrail track, its casualty insurance would not provide coverage.

In short, the actions and requirements just described are the minimum necessary to ensure that work adjacent to a Conrail active rail line is performed in a manner that is safe and protects the interests of Conrail, EPA, its contractors and the general public. EPA's insistence on entry upon Conrail property adjacent to an active rail line without those actions and requirements would be unreasonable, an abuse of discretion, arbitrary and capricious, and beyond EPA's statutory authority under CERCLA § 104(e), 42 U.S.C. § 9604(e).

Sincerely,


Rodney B. Griffith